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~~No. 10, Original.~~

In the Supreme Court of the United States.

~~OCTOBER TERM, 1907.~~

THE UNITED STATES OF AMERICA, COMPLAINANT,
v.
JOHN F. SHIPP AND OTHERS, DEFENDANTS.

BRIEF FOR THE UNITED STATES ON PRELIMINARY QUESTIONS OF LAW.

In the Supreme Court of the United States.

OCTOBER TERM, 1906.

THE UNITED STATES OF AMERICA, complainant, *v.* JOHN F. SHIPP AND OTHERS, defendants.	No. 12, Original.

BRIEF FOR THE UNITED STATES ON PRELIMINARY QUESTIONS OF LAW.

STATEMENT.

The court is of necessity well apprized of this original proceeding in contempt to punish a disobedience of its own command. For the purposes of the present hearing, the facts and pleadings may be stated briefly and informally.

The information sets forth the conviction at Chattanooga, Tenn., in the State court on February 11, 1906, of the negro Johnson, and his sentence to death; his subsequent petition for habeas corpus to the United States Circuit Court, which was heard upon the pleadings and testimony taken, and denied; the remand of him to the sheriff of Hamilton County, Tenn., to be detained for ten

days from March 10, 1906, in order to enable him to prosecute an appeal from the order of the Circuit Court if he was so entitled and advised, and thereafter, in default of the prosecution of an appeal within that time, to be further dealt with by the State Court under its sentence; the application to Mr. Justice Harlan on March 15, praying for the allowance of an appeal to this court, which was allowed on March 17, and on March 19, on motion in open court by counsel for Johnson, was formally allowed by the court in banc in an order which directed on its face "that all proceedings be stayed and the custody of the said appellant be retained during this appeal." (See also record in case of *Ed Johnson, appellant*, v. *The State of Tennessee*, now on file and printed, pp. 1, 50, 51.)

The information also sets forth these further facts upon information and belief: That on the date of the order of this court, namely, on March 19, the clerk of the court notified John F. Shipp, sheriff of Hamilton County, by telegraph, of the entry of the order and its contents, and, specifically, that all proceedings against Johnson were stayed, and that custody of him should be retained by the sheriff pending the appeal; that this telegraphic notice was received by the sheriff before 6 o'clock p. m. on the same day, and that the Chattanooga evening papers of that day published and circulated a full account of the allowance of the appeal and the stay of all further proceedings; that Shipp, as sheriff, and his deputies, all being

so advised of the order and being in full charge and control of the county jail in Chattanooga wherein Johnson was confined under the custody of the sheriff, were informed, and had reason to believe, from reports and rumors conveyed to them, that an attempt would be made that evening by a mob of armed men to force the jail and to take Johnson out and to put him to death by violence, and that, notwithstanding these reports and rumors, the sheriff withdrew the usual guard from the jail, leaving in charge only the night jailor, his deputy, Gibson, and thus and in other ways the sheriff and his deputies evinced a purpose to render it less difficult and dangerous for the mob to carry into effect its unlawful design and purpose of lynching Johnson. The information then proceeds to charge the sheriff and his deputies and the other defendants, naming them all, with a wilful conspiracy to lynch Johnson, and with the intent to show their contempt and disregard for the order of this court, and to prevent the hearing of Johnson's appeal as allowed, and to prevent his exercising and enjoying a right secured to him by the Constitution and laws of the United States, and that in furtherance of this conspiracy the defendants did do, or aid and abet in doing, the acts by and thru which a mob assembled in Chattanooga on the evening of March 19, 1906, between 9 o'clock and midnight, entered the jail with force and arms, broke open the cell in which Johnson was confined, and violently took him from the jail

and to a point a short distance away, and there hanged him by the neck until he was dead.

A rule to show cause was issued upon the information; the answers to the rule plead not guilty in terms or in effect and deny connection or participation with the mob or with any conspiracy as charged; some of the answers claim an alibi; some of them raise questions of jurisdiction, and in particular and as typical of such preliminary defenses in matter of law, the answer of the sheriff and his deputies sets up—

That the charges, even if true, constitute contempt of the judicial authority of Tennessee only, and not of this court, because Johnson's petition in the Circuit Court did not allege a lack of jurisdiction in the State court to try, convict, and sentence him; because his petition does not allege denial of rights secured by the Constitution of the United States under color of any law or authority of the State, but charges that the denials of right were due to the individual action of officials and other citizens of the State in violation of their duty to the State; because the writ of habeas corpus can not be invoked in a court of the United States to review errors in proceedings in a State court, which are cognizable only by the highest court of the State on writ of error. The answer traverses the petitioner's allegations of denial of rights in the State court, and it is contended that the application for habeas corpus to the Circuit Court was not made in good faith; that the Circuit Court had

no jurisdiction, and that this court had no jurisdiction on appeal.

The issues of fact as to guilt and alibi raised by the answers having been postponed, this hearing deals solely with the preliminary questions of law thus raised.

Of course the question of Johnson's guilt or innocence of the crime charged against him in no way arises on this record; nor is it necessary to discuss the various claims of denial of rights which his petition alleged and which are declared to be false and unfounded. These would be proper matters for consideration and determination on the record in *Johnson* v. *Tennessee* if that case were now a live proceeding in this court.

Johnson alleged, in short, that he had not had a fair trial at the hands of the State, and that his rights as a citizen of the United States under the Constitution had thus been infringed. This was denied, but his petition on its face was sufficient to lead the Circuit Court to entertain his application, and that is enough to superimpose a new and distinct constitutional right, namely, the right of appeal to this court, which is a very important right to be maintained in all cases.

Johnson's complaints were that he was denied the assistance of counsel; that the grand jury and the trial jury were illegally constituted; that he was denied a change of venue and a continuance; that he was compelled to testify against himself under circumstances which revealed a prejudiced

juror; that he was denied the right to apply for a new trial or to present a bill of exceptions or to appeal to the Supreme Court of Tennessee. (Rec., pp. 1–6.) These allegations were denied by the answer of the State (Rec., pp. 6–12), and oral testimony was introduced (pp. 13–49).

It is not proper for us to draw any inferences from that record, or comment on it as to the truth of Johnson's complaints in the light of the evidence; that matter is not pertinent or material here, and stands as it was left by his petition, the answer, the replication, the testimony, and the order of the Circuit Court. This court will not now review the facts in that case. Possibly it would not find it necessary to do so if that case were here.

But it can not be assumed that Johnson's charges respecting his trial were unfounded because they were denied or because the answers herein say they were unfounded and were not made in good faith. Testimony was taken on that issue in the Circuit Court. The Circuit Court rendered no opinion, and it does not appear whether the order denying habeas corpus was made because the court deemed the charges untrue, or because, even if true, the court thought there was no valid ground for Federal interference.

With his rights under the State law gone, one by one, in whatever way and for whatever reason, until even the right of appeal to the Supreme Court of the State had been lost, it is not strange that

Johnson challenged that process and result by invoking his Federal rights whatever they were. His appeal to the Federal court was in good faith; it was his only recourse to save his life, if possible. If it was technically frivolous and without merit, it was for this court finally so to determine.

ARGUMENT.

I.

PRELIMINARY.

Some of the points involved may be generally stated and then dismissed or reserved for more detailed discussion.

If Johnson was entitled to be heard in the Circuit Court on his application for habeas corpus, and then in this court on appeal, those are rights secured by the Constitution and laws of the United States. Whatever might have been ultimately decided as to the nature of the other rights which he alleged were denied—whether any or all of them were secured under State law alone or also under the law of the United States—there can be no doubt that the right to initiate habeas corpus proceedings in a Federal court, and the right to come here on appeal if the application is entertained but the writ refused, are Federal rights. A conspiracy such as alleged here would be punishable then under section 5508, Revised Statutes, as depriving a citizen of a privilege secured to him by Federal law; but whether or not that step

shall follow this in due time, that liability can not affect this proceeding.

In the case of *Savin, petitioner* (131 U. S., 267), it was argued that the offense charged was embraced by the statutes and was punishable only by indictment. But the court said (per Mr. Justice Harlan, at p. 275):

> Undoubtedly the offense charged is embraced by that section [R. S. 5399] and is punishable by indictment. But the statute does not make that mode exclusive, if the offense be committed under such circumstances as to bring it within the power of the court under section 725.

Johnson's application was regularly received and heard by the Circuit Court as such, upon answer, replication, and testimony, and was then denied. That was a final judgment of the Circuit Court. The effect of the final order was exactly the same as if the writ itself had been issued and then discharged. The proceeding herein was equivalent to a rule to show cause (Rec., Johnson case, p. 6), and that leads to a final judgment exactly as if the writ were issued.

The law is that from the final decision of a Circuit Court on habeas corpus in the case of any person alleged to be restrained of his liberty in violation of the Constitution or of any law or treaty of the United States an appeal may be taken to the Supreme Court (sec. 763 Rev. Stat.; sec. 764, as amended by the act of March 3, 1885, 23 Stat.,

437). This is still a part of the existing law; and, furthermore, Johnson's appeal was within section 5 of the Circuit Court of Appeals act, because it involved the construction or application of the Constitution of the United States (*Cross* v. *Burke*, 146 U. S., 82; *Ex parte Lennon*, 150 U. S., 393; *Craemer* v. *State*, 168 U. S., 124).

It always rests within the sound discretion of a court to entertain and hear an application for habeas corpus, and then a concrete right to be heard on appeal supervenes, altho the application is heard only to be denied. The defendants seek to show that the habeas corpus proceedings were not in good faith, because the Federal court promptly held that there was no ground for Federal interposition. But that makes no difference. The situation is similar to that in this court when it is held that the court takes and retains complete jurisdiction so long as necessary merely to decide that it has no jurisdiction; and such control and jurisdiction at the threshold, until jurisdiction is deliberately denied on mature consideration, are a protection to every petitioner or appellant. (See *post*.)

It has been decided so often by this court that there is no right to a jury trial in contempt cases that it is only necessary to cite the decisions (*Eilenbecker* v. *Plymouth County*, 134 U. S., 31, citing *Ex parte Terry*, 128 U. S., 289; *Ex parte Savin*, 131 U. S., 267; *Ex parte Cuddy*, 131 U. S., 280). One

sentence from the opinion in the case of *Eilenbecker* v. *Plymouth County* may be quoted:

> If it has ever been understood that proceedings according to the common law for contempt of court have been subject to the right of trial by jury, we have been unable to find any instance of it.

In the case of *Interstate Commerce Commission* v. *Brimson* (154 U. S., 447, 489), the court said: "Surely it can not be supposed that the question of contempt of the authority of a court of the United States, committed by a disobedience of its orders, is triable of right by a jury."

See also *In re Debs* (158 U. S., 564), and the many authorities therein cited.

Compare the jurisdiction and summary power to strike the name of an attorney from the roll, altho the offense was a crime by State law for which the offender was liable to be indicted and convicted. The proceeding itself is due process of law, and indictment and trial by jury are not required. See the learned opinion by Mr. Justice Bradley in *Ex parte Wall* (107 U S., 265), which is an interesting authority here because the offense was the engaging in, advising, and encouraging a riotous gathering which lynched a certain criminal, the attorney "thereby showing such an utter disregard and contempt for the law which, as a sworn attorney, he was bound to support, as shows him to be totally unfitted to occupy such position."

II.

The Circuit Court had jurisdiction of Johnson's case, and this court had jurisdiction on appeal.

Section 14 of the judiciary act of 1789 (1 Stat., 81) authorized the courts of the United States to issue writs of habeas corpus, with the proviso that such writs "shall in no case extend to prisoners in jail, unless where they are in custody under or by color of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify." Later statutes (act of Mar. 2, 1833; act of Aug. 29, 1842; act of Feb. 5, 1867) extended the authority of the courts in this respect, and now section 753, Revised Statutes, drawn from these acts, provides:

> The writ of habeas corpus shall in no case extend to a prisoner in jail, unless where he is in custody under or by color of the authority of the United States, or is committed for trial before some court thereof; or is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process, or decree of a court or judge thereof; or is in custody in violation of the Constitution or of a law or treaty of the United States; or, being a subject or citizen of a foreign state, and domiciled therein, is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, or order, or sanction of any

> foreign state, or under color thereof, the validity and effect whereof depend upon the law of nations; or unless it is necessary to bring the prisoner into court to testify.

Section 755 provides that the court, or justice, or judge to whom such application shall be made shall forthwith award the writ, "unless it appears from the petition itself that the party is not entitled thereto."

The power thus granted to United States courts has been repeatedly held by this court to extend to prisoners in custody under the authority of a State. The leading case on the subject is *Ex parte Royall* (117 U. S., 241), where a prisoner who had been indicted for selling a coupon without a license, under a statute of Virginia, applied to the Circuit Court before trial for a writ of habeas corpus, claiming that the State law was unconstitutional. The petition was dismissed upon the ground that the Circuit Court was without jurisdiction to discharge the prisoner from prosecution, and that judgment was affirmed by the Supreme Court. Mr. Justice Harlan, delivering the opinion of the court, said (pp. 252–253):

> This court holds that where a person is in custody, under process from a State court of original jurisdiction, for an alleged offence against the laws of such State, and it is claimed that he is restrained of his liberty in violation of the Constitution of the United States, the Circuit Court has a discretion

> whether it will discharge him upon habeas corpus in advance of his trial in the court in which he is indicted; that discretion, however, to be subordinated to any special circumstances requiring immediate action. When the State court shall have finally acted upon the case, the Circuit Court has still a discretion whether, under all the circumstances then existing, the accused, if convicted, shall be put to his writ of error from the highest court of the State or whether it will proceed, by writ of habeas corpus, summarily to determine whether the petitioner is restrained of his liberty in violation of the Constitution of the United States.

This ruling has been repeatedly approved. (See *In re Terry*, 128 U. S., 289; *In re Loney*, 134 U. S., 372; *In re Neagle*, 135 U. S., 1; *In re Wood*, 104 U. S., 278; *Cook* v. *Hart*, 146 U. S., 183; *In re Frederich*, 149 U. S., 70; *New York* v. *Eno*, 155 U. S., 89; *Whitten* v. *Tomlinson*, 160 U. S., 240; *Baker* v. *Grice*, 169 U. S. 284; *Tinsley* v. *Anderson*, 171 U. S., 101; *Davis* v. *Burke*, 179 U. S., 399.)

An examination of these authorities shows that while the circuit and district courts undoubtedly have the power to issue writs of habeas corpus in behalf of State prisoners, they are not bound to discharge every such prisoner, and they are to proceed under a sound discretion, having in view the particular circumstances of each case and the relations existing between State and Federal tribunals; that there are certain principles guiding their dis-

cretion which are stated as follows in *Ex parte Royall* (117 U. S., at p. 251):

> We can not suppose that Congress intended to compel those courts by such means to draw to themselves, in the first instance, the control of all criminal prosecutions commenced in State courts exercising authority within the same territorial limits, where the accused claims that he is held in custody in violation of the Constitution of the United States. The injunction to hear the case summarily, and thereupon "to dispose of the party as law and justice require" does not deprive the court of discretion as to the time and mode in which it will exert the powers conferred upon it. That discretion should be exercised in the light of the relations existing under our system of government between the judicial tribunals of the Union and of the States, and in recognition of the fact that the public good requires that those relations be not disturbed by unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution;

that in certain cases of peculiar urgency the courts have interposed by writ of habeas corpus and discharged the prisoner while under commitment by the State authorities and before trial in the State courts (*Wildenhuss' case*, 120 U. S., 1; *In re Neagle*, 135 U. S., 1; *In re Loney*, 134 U. S., 372); but that, except in such urgent and exceptional cases, United States courts will not discharge the prisoner in

advance of a final determination of his case in the State courts; and even after such a final determination they will generally leave him to the usual and orderly course of proceeding by writ of error from the Supreme Court of the State (*Ex parte Royall, supra; Ex parte Fonda*, 117 U. S., 516; *In re Duncan*, 139 U. S., 449; and other authorities cited in *Whitten* v. *Tomlinson* and *Davis* v. *Burke*). As was said by Justice Brown in the last-mentioned case (179 U. S., 399, 402):

> It is recognized, however, that the power to arrest the due and orderly proceedings of the State courts, or to discharge a prisoner after conviction, before an application has been made to the Supreme Court of the State for relief, is one which should be sparingly exercised, and should be confined to cases where the facts imperatively demand it. While the power to issue writs of habeas corpus under Rev. Stat., sec. 753, nominally extends to every case where a party "is in custody in violation of the Constitution, or of a law or treaty of the United States," it is not every such case where the interference of the Federal court is demanded, particularly where the State court is executing its own criminal laws, and is asserting a jurisdiction which does not reside elsewhere, to try an accused person for a violation of such laws. The State courts are as much bound as the Federal courts to see that no man is punished in violation of the Constitution or laws of the

> United States; and ordinarily an error in this particular can better be corrected by this court upon a writ of error to the highest court of the State than by an interference, which is never less than unpleasant, with the procedure of the State courts before the petitioner has exhausted his remedy there.

See also generally *in re Burrus*, 136 U. S., 586.

The facts seemed to "imperatively demand" Federal interposition in this case, not to discharge, but to consider the petition, because the opportunity to apply to the Supreme Court of the State was gone.

In view of these settled principles it is not possible to maintain that the Circuit Court was without jurisdiction, and that Johnson's case could only have gone to the Supreme Court of Tennessee. It was for the Circuit Court to say whether or not the appeal to the Constitution of the United States was a substantial defense. It has been distinctly and repeatedly decided that because the offense is against the State alone and has been adjudged under State laws exclusively, and because the usual course on review is by writ of error from the highest court of the State, and because State tribunals regard and apply the guaranties of the Federal Constitution, are not conclusive reasons why the courts of the United States should not interpose, not only after conviction but even before trial. The necessity or propriety of interposition in any particular case is necessarily committed to the dis-

cretion and determination of the Federal court, subject to review here. And the Circuit Court had as complete jurisdiction, for the purpose and with the result of deciding that the constitutional claim could *not* avail, as if it had decided otherwise and had issued the writ and then discharged the prisoner.

A court is empowered to take a case altho it may not retain it—that is to say, altho it may consider the claim made unfounded. It has jurisdiction to consider and decide either way. The objection here to the jurisdiction of the lower court means nothing more when analyzed than that a case when presented to a court must be impregnable or it is no case at all. Or, putting the matter in a different way, the objection amounts to the proposition that if upon deliberate examination the court concludes that the prayer or claim is without merit—that is, in a case like the present, that the jurisdictional claim of alleged violation of Federal law is without merit, then the court was without jurisdiction *ab initio*. This conception is contrary to the essential idea of the judicial function, which is the considering and deciding of doubtful matters. It is in this view of the judicial function that the court has jurisdiction to decide that it has no jurisdiction; the court takes and retains complete jurisdiction until it concludes that it has none. Manifestly this is true of any case. That is enough to bring a peti-

tioner safe within the shield of the court's power until the conclusion is announced, and, if adverse to the petitioner, until the court's mandate is thereupon issued and received and proceeded with to the surrender of the petitioner to the State.

What does the court mean when it says that the courts of the United States are not bound to discharge every prisoner held in custody under the authority of a State (*Whitten* v. *Tomlinson*, 160 U. S., 231, 240)? That language is a complete answer to the defendants' objections to the jurisdiction of the Circuit Court over Johnson, and to all such implications in those objections which we have just been considering; for the words and the thought obviously and necessarily mean that jurisdiction below is not restricted to an undoubted and palpable violation of the Constitution, but attaches and holds in doubtful cases. The Circuit Court is not bound to discharge every such prisoner, because it may and does remand; and that means of course that it may validly take jurisdiction of a case where the claim of violation of Federal right is not established.

In re Burrus (136 U. S., 586, 591) expresses the same thought, viz:

> It is true that perhaps the court or judge who is asked to issue such a writ need not be very critical in looking into the petition or application for very clear grounds of the exercise of this jurisdiction.

It is well to recall the statutes at this point. "From the final decision of such Circuit Court an appeal *may be taken* to the Supreme Court" "in the case of any person *alleged* to be restrained of his liberty in violation of the Constitution or of any law or treaty of the United States" (secs. 763, 764, R. S.; act of Mar. 3, 1885, 23 Stat., 437). It should also be noted that the answer of the State to Johnson's petition did not challenge the jurisdiction of the Circuit Court nor refer to that matter directly or indirectly (Johnson record, pp. 6–12).

As to this court's jurisdiction we have already touched upon the matter. It is difficult to conceive how the proposition can be denied or challenged. If the Circuit Court has jurisdiction over original proceedings in habeas corpus, then either party has the right to bring the case here. It would seem to be a matter of course and of right under the statutes; but however that may be, in this case a special *allocatur* was granted by the presiding justice and then by the court. It may indeed be said, with deference, that Mr. Justice Harlan first and the court afterwards had no choice whatever but to allow the appeal. Justice Harlan's allowance is exprest to be "pursuant to the statutes of the United States." (Rec., Johnson case, p. 50.)

Apparently no one has ever thought of dispating

the jurisdiction of this court on appeal in such a case involving constitutional grounds, if the Circuit Court took jurisdiction. The right of appeal here follows a final judgment in the court below as surely as day follows night. Certainly no one would challenge the jurisdiction of this court if the Circuit Court had jurisdiction, and accordingly the defendants here deny the jurisdiction of this court simply as a corollary to their contention that the Circuit Court did not possess jurisdiction. But the jurisdiction of this court is not dependent upon contentions, and it has jurisdiction to take the case and retain it for final determination whether it turns out that the Circuit Court had jurisdiction or not.

It may be confidently stated that in no case of appeal on habeas corpus from a decision of the Circuit Court arising under either State or Federal laws, and whether the jurisdiction of the Circuit Court was or was not in question, has any doubt been suggested as to the jurisdiction of this court on appeal.

Whether this court in such a case should affirm or reverse the *judgment* of the court below, that would be in either event tacitly to affirm that court's *jurisdiction* and its own. When any case in this court fails for lack of jurisdiction, either in the court below or here, that cause and effect are made plain by the judgment here, either by dismissal for lack of jurisdiction in this court, or by remanding the case to the court below with in-

structions to dismiss the petition or complaint on the ground of lack of jurisdiction there.

Now it is certain that in no instance has this court dismissed a case of habeas corpus brought to arrest a prosecution in a State court or the execution of the judgment and sentence of a State court because of the alleged violation of rights under the Constitution or laws of the United States, on the ground of lack of jurisdiction in the Circuit Court. Altho the court has laid down rules of guidance and caution for the Circuit Courts which do not limit their jurisdiction, but only direct and restrain its exercise, it has never held that the discretion to entertain a petition was wrongly exercised or that the inferior court proceeded without jurisdiction.

On writ of error from the highest court of a State this court sometimes affirms the judgment, but sometimes dismisses the writ of error on the ground that no constitutional or other Federal question is really and substantially involved (*Brown* v. *New Jersey*, 175 U. S., 172; *Spies* v. *Illinois*, 123, U. S., 131; *Craemer* v. *Washington*, 164 U. S., 704); but in cases of habeas corpus from Circuit Courts involving the authority of State courts, the court has invariably affirmed or reversed the judgment below, thus sustaining the jurisdiction of the Circuit Court. Always a Federal question was necessarily alleged and was sufficiently involved for jurisdictional purposes.

Besides, this court has yet to determine that the

Circuit Court rightly refused to issue the writ or had no jurisdiction to do so, and even if it did so determine, that could only be upon the assumption that it had jurisdiction of the case on appeal. In other words, lack of jurisdiction in the Circuit Court to issue the writ would not mean lack of jurisdiction in this court to entertain and act upon the appeal. *Ex parte Royall* illustrates the point. There the Circuit Court dismissed the petition because it was without jurisdiction to discharge the prisoner from prosecution; but this court took jurisdiction on appeal. It did not decide that the Circuit Court had no jurisdiction; on the contrary, by affirming the judgment and thereby holding that the action of the Circuit Court in discharging was correct, it affirmed its jurisdiction. The form of the Circuit Court's dismissal is somewhat misleading—"without jurisdiction to discharge," etc.; but if it had been held here strictly that the Circuit Court was without jurisdiction, this court would nevertheless have had full jurisdiction of the entire case for that purpose and up to that point.

If Johnson had been permitted to live, a motion to dismiss his appeal or affirm might have been granted on the ground that the Circuit Court had decided rightly in denying his application for the essential reason that no case for Federal interposition had been made. But this would not mean that the court regarded the appeal to the Constitution of the United States as frivolous. Whether it was legally frivolous—that is, not well founded

or set up for delay merely and not in good faith—would be one of the matters to be determined by this court. The court promptly passes upon such cases involving State laws and convictions, but does not readily lean to the suggestion of frivolousness. On the whole, it may be said that when in any case the court is asked to dismiss or affirm on the ground that the Constitution is not really involved and the appeal to it is a mere pretense, the court is not inclined to yield to the suggestion, and is apt to postpone that question to the hearing on the merits, and then often ignores it.

In short, it is perfectly certain that the files of this court are full of cases, civil and criminal, ranging in importance from capital cases to small money demands, from the pleadings and judgments of which it is evident that when a claim under the Constitution of the United States is properly alleged, however unfounded it may turn out to be, this court proceeds deliberately and considers that claim and retains that case in its grasp and under its power in all respects until this court has rendered its final decision and judgment, either to dismiss or to affirm or to reverse.

The opposing contention is in no way strengthened by the immaterial suggestion that Johnson's complaints were against individuals and not against State ordinances or authority. That idea might be challenged on the facts, and of course was one of the questions before the Circuit Court. But if this suggestion were manifestly founded in

verity, the reasons for the distinction between illegal State laws or action and the illegal acts of individuals with respect to the fourteenth amendment (cf. secs. 5508, 5510, Rev. Stat.) are not applicable to this case. We have no occasion herein to argue the proposition that upon the allegations of his petition Johnson was denied the equal protection of the laws and due process of law under color of State authority. We stand on the single proposition, free from all such suggestions and complications, that under the authorities cited the Circuit Court and this court had full jurisdiction of Johnson's case.

III.

The power and jurisdiction of the Supreme Court of the United States to punish contempts of its authority.

This appears to be the only original proceeding in contempt filed in this court. This is the first time in the history of the country and of the court that an order of the court has been disobeyed and its authority contemned. This court preeminently represents and effectuates the judicial branch of power under our Government, and it is more important to sustain its paramount power and dignity than that of any other judicial authority. It is to be certainly assumed, then, that the court will apply in the vindication of its own authority the doctrines which it has laid down in cases coming within its appellate jurisdiction as to the authority of the lower Federal courts over contempts. We

do not need to go back to the common-law authorities on the absolute and inherent power in all superior judicial tribunals to punish contempts; this court has stated in plain and comprehensive language the guiding doctrines (*infra*).

It is certainly a fundamental principle from time immemorial that flat disobedience by anyone within the territorial jurisdiction of the clear and positive order of a court having jurisdiction of the matter is a flagrant contempt. Here the vital fact appears thru the allegations of conspiracy that an order of the court duly promulgated was ignored and set at naught by the defendants. As to precedents for the order, it is understood to be the necessary effect in such cases that the taking or the allowance of an appeal operates as a supersedeas, staying all proceedings under State process and authority pending appeal, and therefore the allowance or order of appeal ordinarily does not specifically direct a stay. (See rule 34.) The State authorities and all other persons bow to the intervening national power, and wait. But here the stay was a part of the order on its face, and that makes the contempt so much the more flagrant.

The following are declarations of the court on the inherent power over contempts, gathering up the settled principles of the common law:

> The power to punish for contempts is inherent in all courts. Its existence is es-

> sential to the preservation of order in judicial proceedings *and to the enforcement of the judgments, orders, and writs of the courts*, and consequently to the due administration of justice. The moment the courts of the United States were called into existence and invested with jurisdiction over any subject they became possessed of this power. (Per Mr. Justice Field in *Ex parte Robinson*, 19 Wall., 505, 510.)

In *Ex parte Terry* (128 U. S., 289, 302, 303) Mr. Justice Harlan, speaking for the court, reviews with entire approval the numerous authorities in this court and in the State courts sustaining the inherent power to punish for contempts, citing the passage from *Ex parte Robinson* above and, among other cases, *Anderson* v. *Dunn* (6 Wheat., 204, 227), which declared that "Courts of justice are universally acknowledged to be vested by their very creation with power to impose silence, respect, and decorum in their presence *and submission to their lawful mandates*." Among the State authorities cited was *Cooper's Case* (33 Vermont, 253, 257), wherein it was said that "The power to punish for contempt is inherent in the nature and constitution of a court. It is a power not derived from any statute, but arising from necessity; implied because it is necessary to the exercise of all other powers." (See also *Savin, petitioner*, 131 U. S., 267, 274; *Eilenbecker* v. *Plymouth Co.*, 134 U. S., 31, 36, 37; *Interstate Commerce Commission* v.

Brimson, 154 U. S., 447, 489; *In re Debs*, 158 U. S., 564, 595, 596.)

This court is the great court of the United States. It was created *eo nomine* by the Constitution, and there the broad outlines of its power and jurisdiction, original and appellate, were marked out. The creation of the inferior courts was left to Congress. There is an essential difference, then, between the Supreme Court of the United States and all other courts of the United States. First, because this court is preeminent as speaking the last word for the judicial power and carrying into final effect the judicial checks and balances on the other departments of government; and, second, because this court looks to the Constitution, not only for its origin in general, but for its express creation, while the inferior Federal courts look to Congress for their actual being, functions, and jurisdiction. The judicial power, of course, operating thru its three well-known branches of law, equity, and admiralty, was not created by the Constitution, but was well understood and existed long before the Constitution was thought of; but the Constitution vested that power in this court by name and in other courts to be established, and stated to what cases the power shall extend. The office of Congress, under the Constitution, is to distribute and not create judicial powers. The distribution to the Supreme Court and by anticipation to the lower courts was accomplished by the

Constitution itself, which also, in large measure, mapped out the jurisdiction of the courts, and Congress finally ordained and established the inferior courts, applying the power, specifying the jurisdiction in detail, and prescribing the particular cases upon which the power and jurisdiction should operate.

When Congress legislates on the judiciary by creating and organizing inferior courts and by prescribing general rules as to the constitution of the courts, jurisdiction, procedure, etc., it generally deals with this court by name, and there is no doubt that this court is embraced in the law (Rev. Stat., Title XIII, Judiciary, ch. 11, Supreme Court, Jurisdiction). It must be admitted, however, that regarding "Provisions common to more than one court or judge" (ch. 12), the exclusive jurisdiction of "the courts of the United States" (sec. 711) must embrace the Supreme Court in that category, because the seventh paragraph of the section includes controversies where a State is a party, of which the Supreme Court has original and exclusive jurisdiction, and because other suits provided for in that section are within the appellate jurisdiction of the Supreme Court, and of course the justices of this court are embraced within the phrase "any judge of any court of the United States" in section 714. Sometimes the statute enumerates the several courts, including this court; for example, relative to the power to issue writs (sec. 716). But in the

present instance, at least, the phrase "courts of the United States" seems to refer to the inferior courts chiefly or solely and not to this court. Section 725, which we are about to set forth and discuss and which restricts the power of the courts of the United States to punish for contempt, is essentially connected with the preceding section and the following section. In section 724 it is provided that "in the trial of actions at law *the courts of the United States* may, on motion and due notice thereof, require the parties to produce books or writings in their possession or power which contain evidence pertinent to the issue." Section 725 then recognizes but restricts the power of "the said courts" to punish contempts of their authority; and section 726 provides: "*All of the said courts* shall have power to grant new trials in cases where there has been a trial by jury for reasons for which new trials have usually been granted in the courts of law."

Now, cases are conceivable, of course, where this court, under section 724, as a court of the United States and a court of chancery, might have occasion to compel the production of evidence, but it is also obvious that the intention of that statute relates chiefly at least to the inferior courts of the United States; and this view of it finds strong confirmation in section 726, which certainly does not mean to include this court in the provision that all of the said courts shall have power to grant new trials. This court can, of course, grant re-

hearings, and it can order new trials in the lower courts by a reversal and *venire facias de novo*. But that is not what the section means. It refers to the *nisi prius* courts. Consequently, we contend that altho this court is necessarily a court of the United States in the general meaning of that term, because it is the greatest court of the United States, yet it is not one of the courts of the United States within the meaning of section 725, Revised Statutes, limiting the power to punish contempts. The power of this court to punish contempts rests upon its inherent power under the common law and as the highest court of the land clothed with unexampled dignity and authority by the Constitution itself.

We are bound to say, however, that the judiciary act of 1789 (1 Stat., 73, 76, 78, 80, 83) provided for the jurisdiction of the district courts (sec. 9), of the circuit courts (sec. 11), of the Supreme Court (sec. 13), and then in section 14, now section 716, Revised Statutes, gives the power to issue writs of scire facias, habeas corpus, etc., to "*all* the *before mentioned* courts of the United States;" and section 15 (now sec. 724, R. S.) specifies "all the *said* courts of the United States," as does section 17 (now sec. 726, R. S.) upon the matter of new trials. It should also be pointed out that the germ of section 725, Revised Statutes, is in section 17 of the act of 1789, following the provision as to new trials, the exact language being—

> *That all the said courts of the United States* shall have power to grant new trials, in cases where there has been a trial by jury for reasons for which new trials have usually been granted in the courts of law; *and shall have power* to impose and administer all necessary oaths or affirmations, and to punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before the same; and to make and establish all necessary rules for the orderly conducting business in the said courts, provided such rules are not repugnant to the laws of the United States.

But at all events, and however this point may be regarded on a comparison of the differing statutory phrases and language, the court has intimated the same doubt which is now exprest. Before citing that authority we trace the further development of the statute.

The act of 1831 (4 Stat., 487) was "declaratory of the law concerning contempts of court." It developed section 17 of the act of 1789 as follows:

> That the power of the several courts of the United States to issue attachments and inflict summary punishments for contempts of court shall not be construed to extend to any cases except the misbehavior of any person or persons in the presence of the said courts, or so near thereto as to obstruct the administration of justice, the misbehavior

> of any of the officers of the said courts in their official transactions, and the disobedience or resistance by any officer of the said courts, party, juror, witness, or any other person or persons, to any lawful writ, process, order, rule, decree, or command of the said courts (sec. 1, act of 1831).

Section 725 combines both the preceding laws, but is in substantially the same form as the act of 1831, providing that:

> The said courts shall have power to impose and administer all necessary oaths, and to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority: *Provided*, That such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person, to any lawful writ, process, order, rule, decree, or command of the said courts.

In *Ex parte Robinson* (19 Wall., 505, 510) the court said, referring to the act of 1831:

> The act in terms applies to all courts. Whether it can be held to limit the authority of the Supreme Court, which derives its existence and powers from the Constitution, may perhaps be a matter of doubt. But

> that it applies to the Circuit and District Courts there can be no question. These courts were created by act of Congress. Their powers and duties depend upon the act calling them into existence, or subsequent acts extending or limiting their jurisdiction.

This remark must, of course, be regarded as *obiter*, since the authority of this court in the matter of contempts was not in question in *Ex parte Robinson*. But it suggests the reasons why this court in the exercise of its inherent powers derived from the Constitution can not be limited by the subsequent restrictions of an act of Congress professing to apply to all courts of the United States. Such an act of Congress controls the courts of its own creation, but not this court if thereby its organic authority and jurisdiction under the Constitution are curtailed.

The opinions in *In re Tampa Suburban R. R. Co.* (168 U. S., 583) and *In re Vidal* (179 U. S., 126), suggest perhaps that the inherent general power of the court to issue writs may go further than the statutory authority. The statutory authority, however, is invoked in those cases for the refusal to issue the writ, rather than rejected. But we have no doubt that in any proper case the court would hold unhesitatingly that its general and inherent authority, of whatever nature, does not need any statutory grant of power and is not subject to statutory restrictions.

But if section 725 shall be held to apply to this court, the present case is included within its very language. We are not now concerned with contempt committed in the face of the court or so near as to be constructively in its presence (*Ex parte Terry*, 128 U. S., 289, 307; *Savin, petitioner*, 131 U. S., 267, 277, 278; 4 Bl. Com., 286); this is one of the "matters that arise at a distance," and accordingly an instant attachment did not issue but a rule to show cause. But altho a matter arising at a distance and not a question of disturbance or decorum in or near the presence of the court, it is the vital matter of refusing to obey the court's command, which is as serious at the remotest corners of the country as in the court room. The language of the statute is that the power to punish extends to "the disobedience or resistance * * * by any party, juror, witness, *or other person*, to any lawful writ, process, *order*, rule, decree, or *command* of the said courts."

In *Eilenbecker* v. *Plymouth Co.* (134 U. S., 31, 38) this language was emphasized, and the court said:

> It will thus be seen that even in the act of Congress intended to limit the power of the courts to punish for contempts of its authority by summary proceedings, there is expressly left the power to punish in this summary manner the disobedience of any party to any lawful writ, process, order, rule, decree, or command of said court.

That was a case coming up from a State court, and the precise point involved was whether a jury trial was required, and the opinion goes on to state that the statute was only designed for the courts of the United States, but that previous opinions of the court show conclusively the ample and summary power inherent in courts generally to inflict punishment for disobedience to their writs and orders without the interposition of a jury. The citation of the act in that case emphasizes the proposition that even where the power to punish in contempt is restricted, the necessary and fundamental power to enforce obedience to lawful orders or to punish for disobeying them is left untouched. And of course the learned justice who delivered the opinion in that case did not intend by using the word "party" alone, and not repeating the entire enumeration of the statute, to intimate any doubt whatever that disobedience by any person whatever was embraced within the power of punishment.

In *Debs's* case (158 U. S., 564, 594, 595) the court says:

> The power of a court to make an order carries with it the equal power to punish for a disobedience of that order.

It will be noticed that the revision omitted the word "summary" which appeared in the act of 1831. Upon that omission the court has observed (*In re Savin*, 131 U. S., 267, 276):

> And although the word "summary" was for some reason not repeated in the present

> revision, which invests the courts of the United States with power "to punish by fine or imprisonment, at the discretion of the court, contempts of their authority" in certain cases defined in section 725, we do not doubt that the power to proceed summarily for contempt in those cases remains as under the act of 1831 with those courts. It was in effect so adjudged in *Ex parte Terry*, above cited.

Of course this shocking occurrence, conceived in lawlessness and revenge, carried on by violence, and ending with murder at the hands of a mob, was an offense against the State as well as against the United States and this court. But the same act may be a crime both against a State and the United States, and the United States has full power to punish whether the State does or not. (*Cross* v. *North Carolina*, 132 U. S., 131; *Pettibone* v. *United States*, 148 U. S., 197; *Crossley* v. *California*, 168 U. S., 640.)

There can be no doubt, then, we contend, that in every aspect this case is firmly before the court. On the point of jurisdiction in habeas corpus with reference to Johnson's case the Circuit Court had jurisdiction and this court had jurisdiction. This court has complete power and jurisdiction to punish summarily contempts of its authority. The court's express command was disobeyed, and in any aspect, on the ground of inherent power and constitutional authority unrestrained by stat-

ute, or within the restriction of section 725, this court may and should inflict due punishment for that disobedience.

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